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In the Supreme Court of the United States

ROBERT HARPER,

Petitioner,

v.

SHERIFF OF COOK COUNTY AND COUNTY OF COOK,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is compliance with the requirements of Rule 23(c)(1)(B) of the Federal Rules of Civil Procedure a jurisdictional prerequisite to interlocutory review under Rule 23(f) of an order allowing a case to proceed as a class action?

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In the Supreme Court of the United States

ROBERT HARPER,

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SHERIFF OF COOK COUNTY AND COUNTY OF COOK,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Robert Harper, individually and for the putative plaintiff class, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 8, 2009.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 581 F.3d 511. The opinion of the district court (Pet. App. 10a-17a) is not officially reported but is available at 2008 WL 4686148.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 2009. A petition for rehearing was denied on November 3, 2009. (Pet. App. 18a.). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

This case involves Rule 23 of the Federal Rules of Civil Procedure, reproduced at Pet. App. 19a-25a.

STATEMENT

Petitioner Robert Harper was arrested without a warrant by a Chicago police officer on September 29, 2005. Petitioner appeared before a judge at about 1:00 p.m. the next day for the hearing on probable cause required by *Gerstein v. Pugh*, 420 U.S. 103 (1975). The judge found probable cause to detain and set a cash bond.

Petitioner's spouse sought to post cash bond immediately after the hearing. The Sheriff of Cook County, however, requires that arrestees be processed into the Cook County Jail before bond may be posted.[1] As a result of this policy, petitioner was not released on bail until about 11:00 p.m., even though his spouse had been ready to post cash bond at 1:00 p.m. that same day.

Arrestees being processed into the jail are held in overcrowded and unsanitary animal cages, with nonfunctioning and overflowing toilets, and are subjected to verbal and physical abuse by correctional officers.[2]

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[1] This policy is set out in a written directive (known as "General Order 13.1 III (B)") of the Cook County Department of Corrections. Petitioner provided a copy of the rule to the Seventh Circuit in the appendix to his brief. Brief for Plaintiff-Appellee in No. 08-3413 (7th Cir), Short Appendix 1-7.

[2] Petitioner supported these allegations in the district court with sworn declarations from 15 members of the putative class.

Petitioner brought suit under 42 U.S.C. § 1983, alleging that the Sheriff's policy of processing arrestees into the jail before allowing the arrestee to be released on bail results in unreasonable seizures, contrary to the Fourth Amendment. Petitioner alleged that the Sheriff did not apply this policy to persons of wealth, clout, or political influence; petitioner asserted that this disparate treatment had deprived him and other similarly situated of equal protection of laws, as guaranteed by the Fourteenth Amendment.

Petitioner asked the district court to allow the case to proceed as a class action for "all persons processed into the Cook County Jail on and after May 2, 2005, while that person, or someone acting on his (or her) behalf, sought to post cash bond." (Pet. App. 12a.)

The district court found that the proposed class satisfied the numerosity requirement of Rule 23(a)(1) (Pet. App. 12a), and presented common questions of law and fact, as required by Rule 23(a)(2).[3] (Pet. App. 14a.) The

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[3] The district court accepted the 6 common questions framed by petitioner (Pet. App. 14a):

(1) whether there is any legitimate need to assign a jail identification number to any arrestee who is ready, willing, and able (either individually or through a friend or family) to post bond;

(2) whether Defendants refuse to accept cash bond until late in the afternoon, resulting in several hours of detention for an arrestee that is ready, willing, and able to post cash bond;

(3) whether persons with wealth, clout, or political influence are allowed to immediately post bond with the assignment of a jail identification number and without being processed into the jail;

(4) whether there is a lawful justification for the lengthy continued detention after bond has been posted;

(5) whether the Defendants apply or enforce the policy alleged in the Complaint and does that policy result in a deprivation of rights secured by the Fourth Amendment; and

(6) whether the Defendants apply a different policy to persons of wealth, clout, or political influence and does that disparate treatment amount to the denial of equal protection under the law.

district court also found that the claims of the named plaintiff satisfied Rule 23(a)(3) because they were typical of those asserted for the class. (Pet. App. 14a-15a.) The district court likewise found that the named plaintiff and his attorneys would adequately represent the putative class, as required by Rule 23(a)(4). (Pet. App. 15a.)

The district court then turned to Rule 23(b)(3) and found that the case satisfied both the "predominance" and "superiority" requirements of the rule. (Pet. App. 15a-16a.) The district court concluded that plaintiff's proposed class definition was too broad, and directed plaintiff to submit an amended class definition. (Pet. App. 16a.)

Before petitioner submitted an amended class definition, respondents filed a petition for permission to appeal under Rule 23(f) of the Federal Rules of Civil Procedure. The court of appeals granted the petition, overruled petitioner's jurisdictional arguments, and concluded that the case could not proceed as a class action.

Petitioner argued to the court of appeals that it lacked jurisdiction to review the district court's ruling because the district court had not yet entered the order required by Rule 23(c)(1)(B).[4] Petitioner pointed out that Rule 23(f) authorized interlocutory review of "an order granting or denying class-action certification under this rule." Petitioner asserted that the order "granting class-action certification" contemplated by Rule 23(f) must comply with Rule 23(c)(1)(B) and define

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[4] Rule 23(c)(1)(B) requires that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)."

the class and the class claims. The court of appeals rejected this jurisdictional argument.

The Seventh Circuit acknowledged that "the district court did not define the class as required by Rule 23(c)(1)(B)" (Pet. App. 4a), but held that the district court's order was reviewable under Rule 23(f) because the order stated "Plaintiff's Motion to Certify Case as a Class Action is granted." (Pet. App. 5a.) The court of appeals explained its ruling as follows:

> There is no doubt that the district court certified the class. Its order states: "Plaintiff's Motion to Certify Case as a Class Action is granted." This allowed the Sheriff to seek permission to file an interlocutory appeal. Harper argues that the Sheriff was required to wait until a new class definition was submitted. But Harper was charged with that responsibility and the Sheriff had only ten days in which to seek permission to appeal. The Sheriff waited as long as he could and acted properly. (footnote omitted)

The court of appeals then turned to the merits and concluded that the case could not proceed as a class action. The court did not reject any of the district court's findings, but considered *de novo* whether petitioner's "claim is suitable for disposition through the class action format." (Pet. App. 5a.)

The court of appeals stated that it "must decipher what [petitioner] is complaining about. (Pet. App. 5a.) Petitioner argued to the court of appeals that the core of his claim is the Sheriff's policy to process arrestees into the jail before allowing the arrestee to be released on bail. The Seventh Circuit refused to consider this theory of the case, stating that petitioner's view of the case involved "an issue that is not central to the litigation." (Pet. App. 7a.) Alternatively, the Seventh Circuit

stated that whether this policy resulted in detention for "an unreasonable amount of time" presented only "individual issues." (Pet. App. 8a.)

The court of appeals also rejected petitioner's Equal Protection challenge, concluding that "class action disposition is not a superior method of litigating this claim" because "the existence and illegality of the Sheriff's discriminatory practice can be satisfied in an individual suit without the management issues of a class action." (Pet. App. 9a.)

REASONS FOR GRANTING THE PETITION

This case provides the Court with an opportunity to resolve a conflict between the circuits on an issue central to class action litigation. This issue arises from the 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure which added Rule 23(c)(1)(b). The Court should resolve this conflict to ensure that the Rules of Civil Procedure are uniformly applied throughout the circuits.

A. Class Actions under Rule 23

The Court thoroughly canvassed the characteristics of class actions under Rule 23 in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 , 613-20 (1997). Relevant to this case is the rule that "the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the Rules are met." *United States Parole Commission v. Geraghty*, 445 U.S. 388, 403 (1980).

The requirements for class certification begin with the four prerequisites of Rule 23(a).[5] In addition, before allowing a case to proceed as a class action, the district court must find that the proposed class satisfies one of the subsections of Rule 23(b).[6] The latter determination involves the balancing of many factors, and "is commit-

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[5] Rule 23(a) provides as follows:

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

[6] Petitioner sought class certification under Rule 23(b)(3), which requires that

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

ted in the first instance to the discretion of the district court." *Califano v. Yamasaki*, 442 U.S. 682, 703 (1979).

Before the 1998 amendments to Rule 23, a district court's decision to grant or to deny class certification could only be reviewed on an interlocutory appeal under 28 U.S.C. §1292(b) or on an appeal from the final decision. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). This changed in 1998.

B. The 1998 Amendments Adding Rule 23(f)

Rule 23 was amended in 1998 to add Rule 23(f), a new provision allowing permissive interlocutory appeals from orders granting or denying class certification.[7] The rule requires that a petition for permission to appeal be filed within 14 days after entry of an order granting or denying a motion for class certification.

Rule 23(f) does not require the district court to "certify the certification ruling for appeal." Advisory Committee Notes to 1998 Amendments adopting Rule 23(f). The drafters of the amendment recognized, however, that "the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal." *Id.* This form of assistance is mandated in the 2003 amendments to Rule 23.

C. The 2003 Amendment Adding Rule 23(c)(1)(B)

Rule 23(c)(1)(B) is one of the provisions concerning the management of class actions added in 2003. The drafters of 2003 amendments viewed their work as "a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device —

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7 The rule allows the court of appeals "unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Advisory Committee Notes to 1998 Amendments adopting Rule 23(f).

efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results." Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2002) at 9.

Rule 23(c)(1)(B) specifies the contents of an order certifying a class-action and provides as follows:

> An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

The drafters of Rule 23(c)(1)(B) explained that the new rule "facilitates application of the interlocutory-appeal provision of Rule 23(f) by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses." Report of the Judicial Conference Committee on Rules of Practice and Procedure (Sept. 2002) at 11. This subsection provides "a written baseline against which to measure the propriety of the certification or noncertification order," *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 243 F.R.D. 17, 18 (D.Me. 2007), and allows the appellate court to "adequately review the certification on appeal under Rule 23(f)." *Beck v. Maximus, Inc.*, 457 F.3d 291, 297 (3d Cir. 2006). Rule 23(c)(1)(B) has not, however, been uniformly applied.

D. The Inter-Circuit Conflict about Rule 23(c)(1)(B)

Rule 23(c)(1)(B) was first analyzed by the Third Circuit in *Wachtel v. Guardian Life Ins. Co. of America*, 453 F.3d 179 (3d Cir. 2006). The court recognized that most class certification orders entered before adoption of Rule 23(c)(1)(B) did not meet the standards of the new rule; the typical order would be a memorandum opinion "discussing the allegations in the complaint, the

facts of the case, and some combination of the substantive provisions for class certification found in Rule 23(a) and (b)." *Id.* 185. As the Third Circuit explained:

> At the conclusion of this type of opinion, or in an accompanying certification order, the court typically states that it is certifying "the following class," or uses some equivalent language, followed by a block paragraph describing precisely those individuals to be included as part of the relevant class or classes. Although examples of common claims, issues, or defenses presented by the case may be discussed as part of the court's commonality, typicality, or predominance analysis, certification orders and memoranda are most often devoid of any clear statement regarding the full scope and parameters of the claims, issues or defenses to be treated on a class basis as the matter is litigated.
>
> *Wachtel, supra,* 453 F.3d at 186.

The Third Circuit concluded that this type of order does not comply with Rule 23(c)(1)(B). The court of appeals concluded, based on the language used in the rule, as well as the "apparent purpose and goals of amending the Rules," 453 F.3d at 186-87, that an order certifying a class action "must include (1) a readily discernible, clear, and precise statement of the parameters defining the class or classes to be certified, and (2) a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis."[8] *Id.* at 187-88.

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[8] The Third Circuit noted that "no particular format is necessary in order to meet the substantive requirement of the Rule." *Wachtel,* 453 F.3d at 188 n.10. In a subsequent decision, that court held that Rule 23(c)(1)(B) is satisfied when the district court states the parameters of the class and outlines how the plaintiffs' claims and the defendants' affirmative defenses "would proceed on a class

An order that fails to meet these standards is not subject to review under Rule 23(f). *Id.* at 189-90.

The First Circuit has endorsed the *Wachtel* standard for Rule 23(c)(1)(B), recognizing that the rule "was added, at least in part, to help appellate courts reviewing an order better understand the district court's decision." *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 588 F.3d 24, 40 (1st Cir. 2009).

The Seventh Circuit in this case afforded a much different construction to Rule 23(c)(1)(B). The court of appeals acknowledged that "the district court did not define the class as required by Rule 23(c)(1)(B)," (Pet. App. 4a), and asserted that it was required to "decipher what [petitioner] is complaining about in order to determine whether his claim is suitable for disposition through the class action format."[9] (Pet. App. 5a.)

The Seventh Circuit held that it had jurisdiction under Rule 23(f) to review the district court's order even though the district court's order did not comply with Rule 23(c)(1)(B). The court of appeals held that the district court's order could be reviewed under Rule 23(f)

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wide basis." *In re Constar International Inc. Securities Litigation*, 585 F.3d 774, 782 (3d Cir. 2009).

[9] Petitioner described the official policy and practice he was challenging in his opening brief in the Court of Appeals as follows:

> Plaintiff was held at the jail for ten hours after bond was set because of General Order 13.1 of the Cook County Department of Corrections, reproduced in Appellee's Short Appendix, *infra*, 1-7. This rule requires that before an arrestee can be released on bond, he (or she) "must be assigned a Cook County Department of Corrections identification number and be processed." (General Order 13.1 III(B), Appellee's Short Appendix 2.) Thus, "no one can be released until they get their unique ID number (CIMIS) for jail detainees." (Record Item 32 at 4.)
>
> Brief for Plaintiff-Appellee in No. 08-3413 (7th Cir), p. 4.

because it stated "Plaintiff's Motion to Certify Case as a Class Action is granted." (Pet. App. 5a.)

The decision of the court of appeals in this case means that an order certifying a class action need not define the class nor identify the class claims, issues, and defenses. All that is required by the Seventh Circuit's interpretation of Rule 23(c)(1)(B) to permit interlocutory review is that the district court's order state that the "motion is granted." This construction of Rule 23(c)(1)(B) reduces the rule to mere precatory language.

The salutary objective of Rule 23(c)(1)(B) to facilitate appellate review is disserved by the Seventh Circuit's interpretation of that rule. The court of appeals in this case refused to accept petitioner's formulation of the class issues, see *ante* at 11 & n.9, and made a *de novo* determination of whether the case "is suitable for disposition through the class action format." (Pet. App. 5a.) Had the court of appeals postponed appellate review until the district court entered an order complying with Rule 23(c)(1)(B), the Seventh Circuit would presumably have limited its review to whether the district court had abused its discretion in certifying the case as a class action to adjudicate the "class claims" described in the Rule 23(c)(1)(B) order. Such review would not have found any abuse of discretion and would have affirmed the order certifying the class.

The conflict about the meaning of Rule 23(c)(1)(B) is squarely presented in this case and should be speedily resolved before uncertainty about the meaning of the rule permeates the lower federal courts.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

February, 2010

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United States Court of Appeals
For the Seventh Circuit

No. 08-3413

ROBERT HARPER,

Plaintiff-Appellee,

v.

SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 1:07-cv-02393—John W. Darrah, *Judge.*

Argued April 6, 2009—Decided September 8, 2009

Before Bauer, Sykes, and Tinder *Circuit Judges.*

Bauer, Circuit Judge. This case involves a confused and confusing class action lawsuit that we put to rest today. Robert Harper sued the Sheriff of Cook County, claiming that when new detainees are remanded to the Sheriff's custody after a probable cause hearing, they are unconstitutionally required to undergo certain intake procedures at the Cook County Jail before being allowed to leave on bond. The district court certified Harper's class, a decision that the Sheriff appeals. We agree with the Sheriff that this is not an appropriate case for class disposition and vacate the decision of the district court granting class certification.

I. BACKGROUND

Harper was arrested by a Chicago police officer on the evening of September 29, 2005. The next day, he was brought before a judge around 1:00 p.m. for a probable cause hearing. The judge found probable cause, set bond at $15,000, and remanded Harper to the Sheriff's custody. Harper claims that his wife attended the probable cause hearing and immediately sought to post cash bond, but was not permitted to post bond until sometime after 4:00 p.m. Harper was released from the Sheriff's custody around 11:00 p.m.

When a detainee returns to the Cook County Jail after a probable cause hearing, he is placed in a bull pen and begins to be processed into the jail. This involves assigning the detainee an identification number, taking his picture and fingerprints, collecting any property carried by the detainee, conducting a personal history interview, performing a psychiatric screening, assigning the detainee to a division within the jail, conducting a medical examination, and a strip search.

Family members or friends who want to post bond for a detainee do so, not with the Sheriff, but with the Office of the Clerk of the Circuit Court of Cook County. The Sheriff's policy directs that "[i]nmates who have their bond posted while going through the intake process are moved ahead of the other inmates in order to speed up their release . . . . In some instances, the psychiatric interview and the medical examination are eliminated." Before releasing a detainee, the Sheriff takes a number of steps to ensure that he is releasing the right person. This process includes checking the detainee's photograph, comparing the detainee's fingerprints with those taken during the intake procedure, and requiring the detainee to provide answers to per-

sonal questions that were asked during the prior personal history interview that only the detainee should know.

Harper brought this action to challenge his detention and treatment in the jail. In his complaint, Harper explained that he "was required to submit to the processing required by the Sheriff's policies of a person being admitted to the Cook County Jail while plaintiff's family members posted cash bond." He went on to describe the processing, which "began with placement into an overcrowded and unsanitary animal cage, and include a chest x-ray, the non-consensual insertion of a swab into plaintiff's penis [to test for STDs], the non-consensual taking of blood, and a strip search which was conducted in a manner calculated to embarrass and humiliate."

In his motion to certify the case as a class action, Harper sought to represent "[a]ll persons who were processed into the Cook County Jail on and after May 2, 2005 while persons acting on behalf of the arrestee sought to post cash bond." He later changed his proposed class definition to "[a]ll persons processed into the Cook County Jail on and after May 2, 2005 while that person, or someone acting on his (or her) behalf, sought to post cash bond." The district court granted Harper's motion to certify the case as a class action, but found that Harper's proposed class definition was too broad and ordered him to provide a new class definition within fourteen days. We granted the Sheriff's petition to appeal from the order granting class certification according to Federal Rule of Civil Procedure 23(f).

II. DISCUSSION

To certify a class, a district court must find that each requirement of Rule 23(a) (numerosity, commonality, typicality, and adequacy of representation) is satisfied as well as one subsection of Rule 23(b). "Failure to meet any of the Rule's requirements precludes class certification." *Arreola v. Godinez*, 546 F.3d 788, 794 (7th Cir. 2008). In this case, Harper claimed, and the district court agreed, that his class action satisfied Rule 23(a) and Rule 23(b)(3) (predominance of common issues and superiority of the class action format). On appeal, the Sheriff claims that none of the Rule 23(a) prerequisites for class certification were met and that Harper's proposed class also failed to meet the requirements of Rule 23(b)(3), so the district court should have denied class certification. We review a district court's decision to certify a class for an abuse of discretion. *Arreola*, 546 F.3d at 794.

A. Jurisdiction

Before getting to the substance of this case, we address a jurisdictional issue. Rule 23(f) states that "[a] court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed . . . within 10 days after the order is entered." The Sheriff followed this procedure and we permitted the appeal. However, Harper claims that the district court's order was not the appealable order contemplated by Rule 23(f) because it did not define the class as required by Rule 23(c)(1)(B), and that, consequently, we do not have jurisdiction to consider the Sheriff's appeal. Harper is correct that the district court did not define the class as it should have, but that does not deprive us of jurisdiction.

There is no doubt that the district court certified the class. Its order states: "Plaintiff's Motion to Certify Case as a Class Action is granted." This allowed the Sheriff to seek permission to file an interlocutory appeal. Harper argues that the Sheriff was required to wait until a new class definition was submitted. But Harper was charged with that responsibility and the Sheriff had only ten days in which to seek permission to appeal. The Sheriff waited as long as he could and acted properly.[1]

Furthermore, the propriety of resolving Harper's proposed class issues through the class action format, which goes to the heart of this appeal, is not dependent on the subtleties of the class definition.

B. Class Certification

Next, we must decipher what Harper is complaining about in order to determine whether his claim is suitable for disposition through the class action format. As the Sheriff notes, Harper's claim has been a moving target throughout this litigation. Harper's actual complaint makes it seem that he is seeking to challenge the specific intake procedures utilized by the Sheriff such as the strip search and STD test. Harper's deposition testimony confirms that he was offended by these two procedures. But Harper assured us multiple times at oral argument that this case is not about searching and swabbing, and we take him at his word. If these were

[1] The Sheriff submitted his Rule 23(f) request to file an interlocutory appeal on the same day that Harper's amended class definition was due. Because Rule 6 directs that weekends are not counted when a time period is less than eleven days, ten days for the Sheriff in this case was the same as fourteen days for Harper.

his claims, this case would be duplicative of two other class actions challenging these procedures at the Cook County Jail. *Young v. County of Cook*, 06 C 552 (strip search); *Jackson v. Sheriff of Cook County*, 06 C 493 (STD testing).[2]

Failing to take issue with any particular intake procedure, Harper is left with a claim that the Sheriff is unconstitutionally holding detainees after bond has been posted.[3] But the constitutionality of this detention depends on whether the length of the delay between the time the Sheriff was notified that bond had been posted and the time that the detainee was released was reasonable in any given case. *See Chortek v. City of Milwaukee*, 356 F.3d 740, 747 (7th Cir. 2004) (delay in processing is actionable if unreasonable). That is an individual issue that will depend on how long each detainee was held after bond was posted and what justifications there might be for the delay on that particular day or for that particular detainee—the time of day, whether the jail was processing an unusually large number of detainees at that time, whether other events

[2] The complaint also mentions a chest x-ray and blood draw as part of the processing procedures. But Harper's brief acknowledges that he had "no problem" with these two procedures

[3] This gives Harper the benefit of the doubt. In some places, his brief claims that detainees should not be processed into the jail when a family member is ready, willing, and able to post bond. But bond is posted at the Clerk's office; Harper does not explain how the Sheriff is to blame for any delay a family member might experience in being allowed to actually post bond with the Clerk and the Sheriff cannot be expected to forego processing based on a detainee's assurances that bond will be posted soon.

occurring at the jail legitimately slowed processing times, whether the detainee's lack of cooperation delayed processing, etc. *See Lewis v. O'Grady*, 853 F.2d 1366, 1370 (7th Cir. 1988) (what is a reasonable time for detaining prisoner after grounds for detention have ceased depends on facts presented in each case). Liability, to say nothing of damages, would need to be determined on an individual basis. Thus, common issues do not predominate over individual issues, making this case inappropriate for class disposition. Fed. R. Civ. P. 23(b)(3).[4]

Harper counters that a common issue predominates: whether it is reasonable to assign a jail identification number to a detainee before allowing him to be released on bond. But claiming that an issue predominates does not make it so. Harper is trying to focus the class certification discussion around an issue that is not central to the litigation. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 624-25 (1997) (basic fact that all members of proposed class were exposed to asbestos was insuffi-

[4] Harper also attempts to bring this action on behalf of individuals who were required to undergo certain processing procedures before being allowed to post bond themselves. It is questionable as to whether Harper can represent these individuals since he did not attempt to post bond himself and so his claim is likely not typical of that portion of the purported class that posted bond themselves. *See* Fed. R. Civ. P. 23(a)(3). Regardless of this typicality concern, the reasonableness of the delay between a detainee informing the Sheriff of his desire to post bond and the detainee's release remains an individual issue to be determined according to the length of the delay and the conditions and exigencies of the jail as they existed on that particular day.

cient to satisfy predominance requirement where greater number of significant individual issues existed); *see also Hyderi v. Washington Mut. Bank, FA*, 235 F.R.D. 390, 403 (N.D. Ill. 2006) ("A putative class representative cannot satisfy the predominance requirement by defining the common issue narrowly and leaving all of the individual issues for follow-on proceedings, especially when the non-common issues are necessarily intertwined with the common issues and resolution of the common issues would not materially advance the litigation."). The fact that the Sheriff assigned Harper an identification number cannot be what caused Harper the embarrassment, humiliation, unreasonable deprivation of liberty, and pain and suffering described in his complaint.

If assigning identification numbers is the predominant issue in this case, then Harper would be arguing that it is unconstitutional to give detainees, who have been remanded to the custody of the Sheriff to keep until trial or until bond is posted, an identification number, regardless of the amount of time it takes to assign the number and ultimately release the detainee. The Sheriff processes approximately 300 new detainees into the jail every day and he must maintain some system of keeping track of who has been committed to, and released from, his custody. There is nothing unconstitutional about assigning an identification number to a detainee who has been remanded to the custody of the Sheriff, unless it takes an unreasonable amount of time or is done in some unreasonable manner. And, as we just stated, those are individual issues.

We have one last matter to resolve. Harper makes an equal protection claim that individuals with wealth, clout, or political influence are not required to undergo the Sheriff's intake procedures, but are allowed to im-

mediately post bond (individually or through a family member) and be released from the Sheriff's custody. Harper admitted that he was not treated differently from anyone he observed in the jail; to support his equal protection claim, Harper obtained an affidavit from a police officer who was arrested and claimed that after his hearing he was not placed into a bull pen or processed into the jail, but was released immediately after the hearing when his wife posted bond. The officer claimed that this is common treatment for persons with clout.

It is easy to understand why police officers would not be placed in a bull pen with other detainees for the safety of the officers. The Sheriff's written policy states that one reason to separate a detainee is his need for protective custody. But either way, class action disposition is not a superior method of litigating this claim. *See* Fed. R. Civ. P. 23(b)(3). Harper is not interested in a large damage award (he claimed at oral argument that he would have brought this case as a Rule 23(b)(2) action for an injunction if he had standing to do so), and his desire to prove the existence and illegality of the Sheriff's discriminatory practice can be satisfied in an individual suit without the management issues of a class action. It would be better to litigate this claim with Harper's other individual claims.

III. CONCLUSION

For the reasons discussed above, we VACATE the district court's certification of Harper's class and REMAND for resolution of Harper's individual claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Robert Harper	)	
	)	
Plaintiff,	)	
	)	No. 07 CV 2393
-vs-	)	
	)	*(Judge Darrah)*
Sheriff of Cook County	)	
and Cook County, Illinois,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Robert Harper, filed a class-action suit against Defendants, Sheriff of Cook County and Cook County, Illinois ("County Defendants"), alleging that the Defendant Sheriff violated his Fourth and Fourteenth Amendment rights by requiring him to participate in certain intake procedures at the Cook County Jail. Presently pending before the Court is Plaintiff's Motion to Certify the Case as a Class Action.

BACKGROUND

A reading of Plaintiff's Complaint supports the following summary of the alleged conduct of the parties.

On or about September 30, 2005, following his arrest, Harper appeared in Central Bond Court. Bond was set by the presiding judge; and Harper was ordered to be held in the Sheriff's custody, pending the posting of bond, Members of Harper's family were present at the bond hearing and immediately sought to post cash bond

while Harper underwent the intake procedures at Cook County Jail. These procedures included Harper's placement in a cell, followed by a chest x-ray, the non-consensual insertion of a swab into the plaintiff's penis, the non-consensual taking of blood, and a strip search conducted in a humiliating manner. It is the practice of the Defendant Sheriff to excuse from these procedures persons of wealth, clout, or political influence who, after bond has been set, are ready, willing, and able to post cash bond. As a result of being subjected to the Defendant Sheriff's intake procedures, Harper, along with others in his putative class, are embarrassed and humiliated and incurred pain and suffering.

ANALYSIS

Allegations made in support of class certification are considered true. *Hardin v. Harshbarger*, 814 F.Supp. 703, 706 (N.D.Ill. 1993). As a general matter, the court does not examine the merits of the case. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir .1993) (*Retired Police*). However, a court "may look beyond the pleadings to determine whether the requirements of Rule 23 have been satisfied." *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 529-30 (N.D.Ill. 1998) (citing *Castano v. American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996)). The party seeking certification bears the burden of establishing that class certification is proper. *See Trull v. Plaza Assoc.*, 1998 WL 578173 (N.D.Ill. Sept.3, 1998).

To receive class certification, a party must satisfy all four elements of Rule 23(a), which include: numerosity, commonality, typicality, and adequacy of representation. Fed.R.Civ.P. 23(a). The party must also satisfy at least one of the three provisions under Rule 23(b).

Plaintiff seeks to certify the following class:

> All persons processed into the Cook County Jail on and after May 2, 2005, while that person, or someone acting on his (or her) behalf, sought to post cash bond.

Numerosity

Rule 23(a)(1) requires that the class be so numerous that joinder of all the members is impracticable. Fed.R.Civ.P. 23(a) (1). Plaintiff need not demonstrate the exact number of class members so long as a conclusion is apparent from good-faith estimates (*Peterson v. H & R Block Tax Servs.*, 174 F.R.D. 78, 81 (N.D.Ill. 1997)); and the court is entitled to make "common sense assumptions" in order to support a finding of numerosity (*Grossman v. Waste Management, Inc.*, 100 F.R.D. 781, 785 (N.D.Ill. 1984)).

Plaintiff projects the number of potential class members to be over 5,700 persons, based on an average of five persons' being released on bail the same day that they were processed into the jail as calculated by 3,558 males' being released on bail the same day that they were processed into the jail for the time period of May 2, 2005 through January 25, 2007.

Defendants argue that Plaintiff's potential class is merely speculative because some individuals may have been released for other reasons, and some of the individuals may be members of two other class actions

brought against the same Defendants.[1] In response, Plaintiff has provided the sworn declarations of fifteen persons who would be included in the proposed class. Plaintiff has sufficiently demonstrated that the number of plaintiffs would be so numerous that joinder of all the members is impracticable.

Commonality and Typicality

Commonality exists if the class members share common questions of law or fact. The requirement is usually satisfied when a common nucleus of operative facts unites a class. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.1992) (*Rosario*). The presence of some factual variations among the class members does not defeat commonality, so long as there is at least one question of law or fact common to the class. *Rosario*, F.2d at 1017.

The typicality requirement of Rule 23(a)(3) is closely related to the commonality requirement of Rule 23(a)(2). *Ruiz v. Stewart Associates, Inc.*, 171 F.R.D. 238, 242 (N.D.Ill. 1997). A plaintiff's claim is typical if it arises from the same event or practice or course of action that gives rise to the claims of other class members

[1] *Jackson v. Sheriff of Cook County*, 06 C 493, class of "All male prisoners at the Cook County Jail who, on or after January 27, 2004, were subjected to the non-consensual insertion of a swab into his penis as part of his admission to the jail." *Young v. County of Cook*, 06 C 552, two classes defined as: "(1) all males who were subjected to a strip search and/or a visual body cavity search as new detainees at the Cook County Jail on or after January 30, 2004; and (2) all persons charged only with misdemeanor or lesser offenses not involving drugs or weapons who were subjected to a strip search and/or a body cavity search as new detainees at the Cook County Jail on or after January 30, 2004."

and if his or her claims are based on the same legal theory. *Rosario*, 963 F.2d at 1018.

Plaintiff argues that the class claims share common questions of fact and law: (1) whether there is any legitimate need to assign a jail identification number to any arrestee who is ready, willing, and able (either individually or through a friend or family) to post bond; (2) whether Defendants refuse to accept cash bond until late in the afternoon, resulting in several hours of detention for an arrestee that is ready, willing, and able to post cash bond; (3) whether persons with wealth, clout, or political influence are allowed to immediately post bond with the assignment of a jail identification number and without being processed into the jail; (4) whether there is a lawful justification for the lengthy continued detention after bond has been posted; (5) whether the Defendants apply or enforce the policy alleged in the Complaint and does that policy result in a deprivation of rights secured by the Fourth Amendment; and (6) whether the Defendants apply a different policy to persons of wealth, clout, or political influence and does that disparate treatment amount to the denial of equal protection under the law.

Defendants' arguments present questions of fact and law that go to the merits regarding the elements of commonality and typicality. A court does not examine the merits of a claim when determining if certification is proper. *See Retired Police*, 7 F.3d at 598.

Defendants also argue that typicality does not exist because of particular facts as to each detainee-for example, the type of bond that was set, the differences in the intake process for female detainees, and possible defenses as to each member's claim. Defendants' argument is not permissive because the proposed class in-

cludes only those individuals subject to the claimed offensive procedures while remaining in custody although able to post a cash bond. Accordingly, Plaintiff has satisfied both the commonality and typicality requirements. *See Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998) ("Common nuclei of fact are typically manifest where ... the defendants have engaged in standardized conduct towards members of the proposed class ...").

Adequacy of Representation

The class representatives must "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a). In determining adequacy of class representation, the court considers whether (1) any conflicts of interest exist between the named plaintiffs and the class members and (2) the named plaintiffs' counsel will adequately protect the interests of the class. *Gaspar v. Linvatec Corp.*, 167 F.R.D. 51, 58 (N.D.Ill. 1996).

Defendants argue that Harper is not an adequate representative party because he cannot state an actionable claim. The Court has previously held that Plaintiff sufficiently pled a cause of action, and the Court will not address the merits of Plaintiff's specific claim at this time. Defendants do not challenge the adequacy of class counsel, and class counsel has extensive experience litigating class actions.

Rule 23(b)(1)(3)

Plaintiff seeks class certification under Rule 23(b)(1)(3). Certification under Rule 23(b)(1)(3) is appropriate if "questions of law or fact common to class members predominate over any questions affecting only individual members" and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(1)(3).

As discussed above, Plaintiff has established common questions of law and fact as to the class. Defendants again argue that individual issues predominate over any common questions of law or fact-for example, the detainee's history, the amount of bond, and whether the individual proceeded through receiving procedures. Defendants have not demonstrated that these issues are material to defeat the certification of the proposed class. The individual issues that Defendants argue are predominant are not material as to the common questions of whether there is any legitimate need to assign a jail identification to any arrestee who is ready, willing and able to post cash bond or whether Defendants permit persons of wealth, clout or political influence to post bond without being assigned a jail identification number and without being processed into the jail.

Defendants also argue that certifying a class action in the instant case is not a superior method of adjudication because the instant class would conflict with and overlap with other class actions. However, *Jackson*, 06 C 493, which was recently settled, involved sexual-transmitted disease testing of males processed into the jail; and *Young*, 06 C 552, which is presently awaiting trial, challenged various aspects of the jail's strip search policies and do not resolve the claims asserted here.

CONCLUSION

For the foregoing reasons, the Plaintiff's Motion to Certify Case as a Class Action is granted. However, Plaintiff's proposed class definition is too broad, appearing to include individuals that do not fall within the claims set forth in Plaintiff's Complaint-persons who where subject to, and required to submit to, the intake procedures of Cook County Jail on or after May 2, 2005, while that person, or someone acting on his or her be-

half, was willing and able to post cash bond. Accordingly, Plaintiff is to file an amended class definition within fourteen days of this order. A status hearing is scheduled for June 18, 2008, at 9:00 a.m.

Dated: May 29, 2008

/s/ John W. Darrah
United States District Judge

United States Court of Appeals
For the Seventh Circuit

No. 08-3413

ROBERT HARPER,

Plaintiff-Appellee,

v.

SHERIFF OF COOK COUNTY and COOK COUNTY, ILLINOIS,

Defendants-Appellants.

November 3, 2009

ORDER

On consideration of plaintiff-appellee's petition for rehearing and suggestion for rehearing *en banc* filed on September 21, 2009, in connection with the above-referenced case, no judge in active service has requested a vote on the petition for rehearing *en banc* and all of the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that the petition for rehearing and suggestion for rehearing *en banc* is DENIED.

Rule 23. Class Actions

(a) Prerequisites.

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) Notice.

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members

the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) Judgment.

Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) Particular Issues.

When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) Subclasses.

When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) Conducting the Action.

(1) In General.

In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) Combining and Amending Orders.

An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) Settlement, Voluntary Dismissal, or Compromise.

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

(f) Appeals.

A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel.

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel.

The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) Duty of Class Counsel.

Class counsel must fairly and adequately represent the interests of the class.

(h) Attorney's Fees and Nontaxable Costs.

In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are

authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).